Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)	CC Docket 98-146

MOTION FOR LEAVE TO FILE COMMENTS

The Center for Media Education, Office of Communication, Inc., United Church of Christ, Minority Media and Telecommunications Council, The Civil Rights Forum, and Consumer Federation of America (collectively "CME, et al.") respectfully request leave to file Comments in the above captioned matter three days late. CME, et al. were unable to file their Comments on time because of unforeseen difficulties in coordinating among their various organizations. Although CME, et al. recognize both the importance of the matter and the need to act quickly, the granting of this motion to file Comments three days late will not prejudice any party, as ample time remains before Reply Comments are due.

Respectfully submitted,

Angela J. Campbell

Angela J. Campbell
Counsel for CME, et al.

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Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

To: The Commission

COMMENTS OF
CENTER FOR MEDIA EDUCATION
OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL
THE CIVIL RIGHTS FORUM
CONSUMER FEDERATION OF AMERICA

Of Counsel:
Jeneba Jalloh
Graduate Fellow

Curtis Caddell
Law Student
Georgetown University Law Center

September 17, 1998

Angela J. Campbell, Esq.
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, NW.
Washington, DC 20001
(202) 662-9535

Cheryl Leanza, Esq.
Andrew Schwartzman, Esq.
Gigi Sohn, Esq.
Media Access Project
1707 L St., Suite 400, NW
Washington, DC 20036
(202) 232-4300

Counsel for CME, et al.

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SUMMARY

Section 706 of the Telecommunications Act of 1996 requires the FCC to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. In making this assessment, the FCC should take into account Section 151 of the Communications Act, which was recently amended to ensure that telecommunications facilities are made available to all people of the United states, "without discrimination on the basis of race, color, religion, national origin, or sex." The FCC should also take into account the principles of universal service, as articulated in Section 254(b). Specifically, the Commission must ensure that consumers in all regions of the nation, including low-income consumers, have access to advanced telecommunications and information services.

Despite these mandates in the Telecommunications Act, several studies have indicated that not all Americans have access to advanced telecommunications capability. These studies indicate that deployment of advanced services has not been reasonable, but rather has resulted in disparities based on race, income, and geography.

Unless advanced telecommunications capability is provided to all Americans in a reasonable and timely, nondiscriminatory manner, underserved populations will have fewer opportunities in the 21st century. The future of inner city jobs may depend upon the reasonable provision of advanced telecommunications capability Citizens who do not have access to advanced telecommunications capability will be increasingly less able to communicate with governmental entities that significantly affect their lives. Moreover, advanced telecommunications capability connects citizens with their communities and important non-

governmental information sources. CME et al. therefore urges to the FCC to carefully analyze the reports highlighted in these comments and take appropriate action to ensure that advanced telecommunications are deployed in a manner that affords disconnected and disenfranchised groups access to those services.

The Commission must also ensure that as convergence takes place, that the First Amendment rights of citizens to obtain information are given the highest protection. For example, cable operators have begun to provide access to the Internet access via cable modems. Cable operators, however, have not traditionally been subject to common carriage requirements which prohibit the control of the information traveling on their networks. The FCC should ensure that citizens enjoy unlimited access to information regardless of the technology they use to access the Internet.

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To: The Commission

Comments

The Center for Media Education; Office of Communication, Inc., United Church of Christ; Minority Media and Telecommunications Council; The Civil Rights Forum; and Consumer Federation of America ("CME, et al."), by their attorneys, respectfully submit the following comments in response to the FCC's Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Dkt. No. 98-187 ("98-187"). This Notice of Inquiry ("NOI"), poses many questions and seeks comment on ways to make the deployment of advanced telecommunications capability to all Americans "more efficient and more inclusive." NOI at ¶1. These comments address two main issues: (1) whether advanced services are being

deployed in a reasonable and timely fashion to all Americans, NOI at ¶¶9, 59; and (2) what basic legal and regulatory model should govern the deployment of advanced telecommunications capabilities. NOI at ¶¶77, 81.

I. ADVANCED TELECOMMUNICATIONS ARE NOT BEING DEPLOYED IN A REASONABLE AND EQUITABLE MANNER TO ALL AMERICANS

A. The Telecommunications Act Prohibits Discrimination on the basis of Race and Geographic Location and Requires Special Attention to Ensure that Low-income Americans have Access to Advanced Telecommunications Services.

Section 706 of The Telecommunications Act of 1996 requires the Commission to determine whether advanced telecommunications capability is being deployed on a "reasonable and timely" basis.[1] If the Commission's inquiry determines that advanced telecommunications capability is not being deployed in a "reasonable and timely" fashion, the Commission must "take immediate action to accelerate deployment of such capability."[2]

To determine whether deployment is "reasonable," the Commission should read Section 706 in conjunction with the purposes of the Communications Act expressed in Title I, Section 1. Section 1, as amended by the 1996 Act, states that the purpose of the Act is to "make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, nationwide and world-wide wire and radio communications service." 47 U.S.C. §151 (emphasis added). The emphasized language was added by the 1996 Act.

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[1] See The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter 1996 Act].

[2] Id.

Likewise, the Commission should interpret Section 706 in conjunction with the related universal service provisions contained in Section 254. Section 254 sets forth several principles for guiding the FCC's policies for the advancement of universal service. Specifically, section 254(b)(2) states that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." Moreover, section 254(b)(3) mandates that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including...*advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas" (emphasis added).

Therefore, in determining whether advanced telecommunications capability is being deployed on a reasonable and timely basis, the FCC must determine, *inter alia*, whether such capability is being deployed in a racially non-discriminatory manner, whether low income consumers have sufficient access, and whether all geographic regions have comparable access.[3]

B. Despite the Telecommunications Act's Mandate, Many Americans Lack Access to Advanced Telecommunications

The Commission seeks to determine whether the demand for advanced services varies "among different regions, neighborhoods, and types of customs (based on age, education, income, etc.)." NOI at ¶60. The term "advanced services" includes many different types of services, including satellite systems, DTV, and the Internet. These comments focus on access to

[3]Though the Commission does not specifically seek comment on how education level and age influence access to advanced technology, they are factors that should be considered. College graduates are twenty times as likely to be online as those who never went to high school. Also, the "young" and the "old" are less likely to be online at their homes than those between twenty-five and fifty-five years old. Although this is not surprising -- those under twenty-five generally have little disposable income, and those over fifty-five have lived most of their lives outside of the computer revolution -- it is still troubling that so many Americans lack access to advanced telecommunications capability.

the Internet for two reasons. First, the NOI specifically asks about Internet access. See, e.g., NOI at ¶¶19, 25, and 37. Second, the Internet has been touted as the preeminent means of integrating disenfranchised people into mainstream society, thereby providing them a window into the world beyond their often disconnected communities. As a result, many studies have focused on the question of Internet access and use.[4]

Since the passage of the 1996 Telecommunications Act, the Internet revolution has continued to spread -- 36.6% of Americans own personal computers, up 51.9% over 1995; 26.3% of Americans own modems, up 139.1% over 1995; and 18.6% of Americans have Internet access from their homes, up an astounding 397.1% since 1995. See NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE 2 (1998) <http://www.ntia.org.doc.gov/ntiahome/net2/falling.html> ("NTIA Report"). Several recent studies, however, suggest that advanced communications capability is not being deployed in a reasonable and timely manner to all Americans.

In July 1998, NTIA released a study which analyzed telephone and computer penetration and on-line access rates across the United States. See id. Analyzing data compiled by the Census Bureau, NTIA found a "persisting digital divide" in terms of computer usage. See id. at Sec.III, Highlights. The Benton Foundation also published a report this year which provides statistical and anecdotal evidence of an ever-increasing technology gap between low income communities and the rest of the nation.[5] Most recently, professors at Vanderbilt University and

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[4]In paragraph 59, the NOI asks whether the Commission should examine deployment of facilities or actual use of services. CME, et al. believe that the Commission's focus should be on the use of services.

[5] COMMUNICATIONS POLICY AND PRACTICE, BENTON FOUNDATION, LOSING GROUND BIT BY BIT: LOW INCOME COMMUNITIES IN THE INFORMATION AGE (1998)<http://www.benton.org/Library/Low-Income> [hereinafter

the University of California at Irvine, as part of the Aspen Institute, published a report which explores the relationship of race to Internet access and use.[6] The information contained in these reports provides convincing evidence regarding the "digital divide" that should not be ignored. Interpreting these studies, CME, et al. found that income was the most significant factor contributing to the disparity in access. However, even controlling for income, the studies also reveal differences based on race and geography.

1. Disparities Exist Based on Income

Income is one of the most significant factors which affect Internet use and, consequently, the deployment of the infrastructure needed to access the Internet. The studies found a correlation between access and income. The Vanderbilt Report found that "web users" were most likely to be among the wealthiest individuals (those with incomes of $60,000 and higher). See Vanderbilt Report at 136. NTIA also found that income greatly affects penetration levels: 49.2 % of Americans earning over $75,000 and 32.4% of those earning between $50,000 and $74,999 had on-line access compared to just 7% of those earning between $15,000 and $19,999 and 4.9% of Americans earning between $10,000 and $14,999. See NTIA Report at chart 20.

Presumably, one reason for such discrepancies in on-line use is that wealthier households can more easily afford access. However, another possible cause is that private companies have

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"Benton Report"].

[6] See Donna L. Hoffman, Thomas P. Novak, and Alladi Venkatesh, Diversity on the Internet: The Relationship of Race to Access and Usage, in INVESTING IN DIVERSITY: ADVANCING OPPORTUNITIES FOR MINORITIES AND THE MEDIA 136 (The Aspen Institute: 1998) [hereinafter "Vanderbilt Report"]. See also, Thomas P. Novak and Donna L. Hoffman, Bridging the Digital Divide: the Impact of Race on Computer Access and Internet Use, February 2, 1998 <http://www2000.ogsm.vanderbilt.edu/papers/race/science.html>. (Both surveys rely on the Spring 1997 CommerceNet/Nielsen Internet Demographic Study conducted from December 1996 through January 1997).

traditionally ignored low income areas when deploying advanced technology infrastructure and services. For example, in 1992, Bell Atlantic devised its plan to rewire all of New Jersey's telephone lines with fiber optics technology by 2010. See Benton Report at 13. However, by 1994, only 2% of New Jersey had actually been rewired: tellingly, that 2% consisted entirely of large corporations and suburban business parks.[7] If left unaddressed, traditional "redlining" practices will likely continue. Thus, the Commission cannot allow market influences to control absolutely the deployment of advanced services.

2. Disparities Exist Based on Race

While income has a major influence affecting Internet penetration rates, it is not the sole factor. A large discrepancy also remains among different races in computer ownership and online access.[8] The NTIA study found that White households were more than twice as likely to own a computer and almost three times as likely than Black or Hispanic households to have on-line service to their homes. See NTIA Report at Sec. III, Race. Further, 21.2% of Whites have on-line access as compared to only 8.7% of Hispanics and 7.7% of Blacks. See id. at chart 21.

Blacks and Hispanics also lag behind Whites in telephone ownership. Though considered a basic telecommunications technology, telephone service is the key to traditional Internet access.

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[7] See Melody Petersen, *New Jersey Telephone Plan Neglects the Poor, Critics Say*, NY TIMES, B1, B6 (April 17, 1997) (stating that only 800,000 of New Jersey's 56,000,000 miles of wire were equipped with fiber optics technology by 1997). See also, Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities of Center for Media Education, et al. (Filed May 23, 1994).

[8] One study questions the continued existence of the digital divide. See David Birdsell, et al., *Web Users Are Looking More Like America*, THE PUBLIC PERSPECTIVE 33, 34 (April/May, 1998) (citing surveys conducted by the Harris Survey Unit of Baruch College and Louis Harris and Associates which found that "almost equal percentages of Whites, African Americans, and Hispanics logged onto the Web"). The bulk of the evidence, however, continues to confirm the existence of the digital divide See, e.g., Baruch College-Harris Poll (April, 1997); NTIA Report at chart 13.

As the Commission pursues discussions regarding "advanced technology" and "high speed access," it must not lose sight of facts which show that plain old telephone service ("POTS") has not been fully deployed. NTIA found that while 95.9% of White households own a telephone, only 86.5% of Hispanic households and 86.0% of Black households own a telephone. See id. at chart 4.

Even among low income households, Whites have higher telephone penetration rates than Blacks and Hispanics. The NTIA study revealed that of those earning less than $15,000 per year, 90.3 % of White households had telephone service, compared with just 76.3% of Black and 78.4% of Hispanic households. See NTIA Report at chart 5.

3. Disparities Exist Based on Geographic Location

The studies also found wide disparities based on geographic location. According to NTIA, inner cities and rural areas lag behind the national average for on-line access, with inner cities in the northeast having the lowest percentage of Americans who are on-line.[9] Urban areas, however, including the suburbs, have the highest rates of Internet penetration.[10] For example, people living in urban areas in the western states are more likely than those living anywhere else in America to be online.[11]

The facts in these studies suggest that advanced services are not being deployed in a non-discriminatory, reasonable and equal manner. While the Internet could be a means of integrating

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[9] See NTIA at 2 (stating that only 17.3% of residents in America's central cities, 14.8% of residents in America's rural areas, and 12.6% of residents in the central cities of the northeast are online, as opposed to 18.6% of all Americans). See also, id. NTIA Report at Sec. III. Geographic Area (citing charts 10, 19 and 24).

[10] See id. (stating that 19.9% of residents in America's urban areas are online).

[11] See id. (stating that 23.1% of residents in the urban areas of western states are online).

the poor into mainstream society, without steps to ensure the equitable deployment of advanced services, a greater gap between the "haves" and "have nots" will develop.

C. A Failure to Ensure that All Americans Can Use Advanced Telecommunications Will Have Serious Consequences for Society

A recurring theme in all the studies mentioned in these comments is that unequal deployment of telecommunications has widened and will continue to widen the gap between those who are technologically connected and those who are not. The Benton Report, especially, described numerous societal problems that may result from permitting such unequal deployment

1. The Future of Inner City Jobs Depends Upon the Reasonable Provision of Advanced Telecommunications Capability

The Benton Report found that failure to provide all Americans with advanced telecommunications capability may result in the almost inevitable migration of jobs from lower income residents of the inner cities to the suburbs. The primary reason for this migration will be that telephone and cable companies have "moved quickly to wire wealthier suburbs with advanced systems," while not upgrading "poor, inner-city neighborhoods." See Benton Report at 2. As a result, poor, inner-city neighborhoods have become less attractive to businesses that require top-notch information technology systems. Id. Simultaneously, the newly improved suburbs have become more attractive to those businesses who are dissatisfied with the advanced telecommunications capabilities available to them in the inner cities. The Benton Report predicts a downward spiral will result: jobs leave the inner city for the suburbs; the economy of the inner city suffers; the infrastructure collapses further because neither the residents nor the city have the income to spend on advanced telecommunications capability; more businesses leave for the suburbs; and more jobs leave for the suburbs. Id. The residents of the inner cities need equality

in access to advanced telecommunications capability to compete with suburbanites in the digital world of the twenty-first century.

2. Citizens Who Do Not Have Access to Advanced Telecommunications Capability Will Be Increasingly Less Able to Communicate with Governmental Entities that Impact Their Lives

The Benton Report further found that citizens who do not have access to advanced telecommunications capability will be increasingly disadvantaged in their ability to communicate with the government. The study cites projections from the Office of Management and Budget that 75% of transactions between individuals and the federal government, including transactions concerning food stamps, SSI and Medicaid, will eventually take place over the Internet. See Benton Report at 4. This means that those citizens who currently lack access to advanced telecommunications technology will also have the most to lose if they continue to lack access. For example, a single mother who fails to get food stamps because she lacks access to an agency's web site is at greater risk than the owner of a vacation home that fails to find out about a tax break on the IRS web page. Citizens who have advanced telecommunications capability will be able to interact with governmental entities more efficiently than ever before, but citizens who lack advanced telecommunications capability will find it increasingly difficult to get the basic information and services they need.

3. Advanced Telecommunications Capability Connects Citizens with both their Communities and Important Non-Governmental Information Sources

Without access to advanced telecommunications capability, disaffected citizens will find themselves even more tenuously connected to their communities. This is because civic organizations, like governmental entities, are increasingly relying on the Internet to convey

information. Those who have access to advanced telecommunications capability can now learn more about community organizations and activities than ever before, but those who do not have access have to work harder than ever to become or remain involved in community affairs.

Advanced telecommunications capability also offers enormous opportunities for health and life improvement. For example, information about experimental drugs, healthy habits, or local doctors is available on-line; and telemedicine offers an economically feasible alternative to air lifts for non-emergency cases, or physician house calls by airplane, for residents of remote areas. Further, the technology can enable disabled people to participate more fully and independently in society. For example, the Internet and video conferencing can eliminate the need to commute, thereby making it easier for a disabled person to live and work in a town that lacks a comprehensive public transit system.

The Internet also offers the unemployed and underemployed an extremely efficient way to search for jobs. For example, many corporations and agencies post job openings on their web sites and accept applications and resumes electronically. Community technology centers have taken advantage of advanced telecommunications technology to help those who took computer classes both to improve their job skills and to look for a job. As a result, of those job-seekers who used the Internet access at their technology center to look for a job, 60% said "they were a 'lot closer' or had 'reached' their goal of finding a job."[12] In contrast, "only 33% of job seekers who had not looked for a job on the Internet while at the center said that they were a 'lot closer'

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[12] CTCNET RESEARCH AND EVALUATION TEAM, COMMUNITY TECHNOLOGY CENTER'S NETWORK, IMPACT OF CTCNET AFFILIATES: FINDINGS FROM A NATIONAL SURVEY OF USERS OF COMMUNITY TECHNOLOGY CENTERS, Part IV, page 6 (1998).

or had 'reached' their goal of finding a job."[13] Many valuable information resources, the loss of which disproportionately burdens poorer Americans, are most easily available to those who have access to the Internet.

No one doubts that advanced telecommunications capability will be a prerequisite for success in the 21st century. What not everyone realizes, however, is that advanced telecommunications capability will be a necessary component of everyday life. Without advanced telecommunications capability, citizens will find it much more difficult to get information from governmental or corporate entities. It will also be more difficult to be involved in one's community, or to find meaningful employment or quality health care.

II. THE COMMISSION MUST ENSURE THAT INTERNET ACCESS PROVIDED VIA ANY MEDIUM RECEIVES THE HIGHEST FIRST AMENDMENT PROTECTION

The Commission seeks comment on the basic legal and regulatory model that will govern the deployment of advanced telecommunications capabilities. Because advanced services include access to the Internet, the Commission must take into account First Amendment principles when it makes determinations about the legal and regulatory model that will govern the provision of Internet access. The Commission must take steps to ensure cable operators do not obtain exclusive control over the content provided via cable-modem connections to the Internet.

As discussed above, Internet users are not only subscribers, but also *citizens*, using the Internet to receive information about political issues, government-distributed information, and

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[13] See id.

local matters. As Professor Cass Sunstein has concluded, "[o]ur constitutional system is one of deliberative democracy" and the government's role is to stimulate and nurture democracy. Sunstein, The First Amendment in Cyberspace, 105 Yale L.J. 1757, 1762 (1995). Under the First Amendment, therefore, government is not only prohibited from restricting speech, but it should also *promote* "attention to public issues, . . . [and] . . . diversity of view." Id. The Commission must preserve the current status of the Internet as an environment for free expression and civic discourse, as well as other means of communication.

In each mode of regulation -- common carrier, cable television, and broadcast -- the FCC has recognized, at bottom, that an entity with control over a certain distribution medium must be prohibited from using that control to stifle public debate. Thus, each system of regulation promotes, to varying degrees, the public discourse protected by the First Amendment. Common carriers are prohibited from controlling content transmitted over their infrastructure; cable operators are required to offer public, educational, and governmental (PEG) channels and leased access channels; and broadcasters' license renewals are conditioned upon their compliance with public interest requirements in Title III of the Communications Act.

Until this time, Internet access has been obtained almost exclusively via common carrier infrastructure. Because under common carrier regulation no one entity controls the information that can be placed on the Internet, and no entity limits what information a citizen can obtain on the Internet, the Internet is the most democratic and free medium that has thus far been produced. See, e.g., Reno v. ACLU, 117 S.Ct. 2329 at 2343 (1997). This freedom has been fostered by the restrictions placed on common carriers that prevent them from controlling the information available to subscribers over the public switched telephone network. For this reason, the

Commission has sound reason to extrapolate the limitations imposed on common carriers to other providers that sell Internet access services. For example, the traditional common carrier prohibition against bundling transmission services with enhanced or information services should be applied to other providers of Internet access. See NOI at ¶82.

Recently, cable operators have begun to provide access to the Internet via cable modems. This mode of access may prove to be the most popular method of obtaining access to the Internet yet developed because it enables customers to access large amounts of information very quickly, reducing the amount of time a consumer may have to wait to view a particular web site, and, possibly enabling the transmission of real-time video in the future. As such, if the Commission wishes to ensure that this medium, which the Supreme Court has determined is worthy of the highest First Amendment protection, Reno v. ACLU, 117 S.Ct. at 2344, remains a free and democratic medium, the Commission must ensure that cable operators are not allowed to monopolize the content subscribers may view over their cable-provided Internet access.

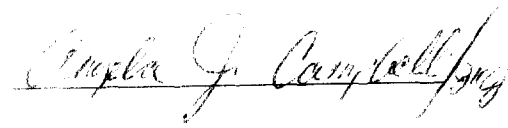
Moreover, allowing cable operators to control the content obtained by subscribers over cable modem access to the Internet would be completely inconsistent with other methods of regulation. Specifically, while cable operators are allowed to choose the content they provide over most of the channels in their systems, they are also required to provide PEG channels and leased access channels over which they have no control. 47 U.S.C. §§ 531(e), 532(c)(2). Common carriers are prohibited from controlling the content transmitted over their infrastructure. Broadcasters are required to serve the public interest pursuant to Title III. To allow cable providers to control the information provided over the Internet connections they provide to their subscribers would grant them control not granted to other similarly-situated communications

companies. The recent Office of Plans and Policy Working Paper, Internet Over Cable: Defining the Future In Terms of the Past by Barbara Esbin, raised many important issues with respect to cable provider provision of Internet access. Due to the small amount of time available between its release on September 4, 1998 and the due date of these comments on September 14, CME, et al. were not able to conduct a thorough analysis of the working paper. CME, et al. intend to complete a thorough analysis of this paper in its reply comments.

IV. CONCLUSION

CME, et al. have shown that disparities exist in access to advanced telecommunications capability and described the ramifications that follow therefrom. Under the Telecommunications Act, advanced telecommunications capability must be provided in a reasonable and timely, nondiscriminatory manner to all Americans. The Commission must take steps to implement this Congressional mandate. Furthermore, as more cable operators move towards providing Internet access via cable modem, the Commission should consider the risks to First Amendment principles in retaining a regulatory framework which would allow cable operators to control the content obtained by subscribers.

Respectfully submitted,



Angela J. Campbell, Esq.
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, NW.
Washington, DC 20001
(202) 662-9535

Cheryl Leanza, Esq.
Andrew Schwartzman, Esq.
Gigi Sohn, Esq.
Media Access Project
1707 L St., Suite 400, NW
Washington, DC 20036
(202) 232-4300

Counsel for CME, et al.

Of Counsel:
Jeneba Jalloh
Graduate Fellow

Curtis Caddell
Law Student
Georgetown University Law Center

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